No. 15388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANASTASIO LAWRENCE AMAYA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division, the Honorable Thurmond Clarke, Presiding.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

On August 22, 1956, appellant and co-defendant Dan Casias[1] were indicted [Clk. T. 1][2] in the above-mentioned federal District Court for alleged violation of Title 18,

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[1]Counsel is informed that the co-defendant, Casias, commenced and later abandoned an appeal in this action (for lack of funds). No further reference is made to this co-defendant hereinafter save for the purposes of clarification.

[2]Clk. T. is a shorthand reference to the Clerk's Transcript on Appeal, consisting of pages i-iii, and 1-27, and contained in the fore-part of the transcript of record.

Authority to proceed on typewritten record was granted by Order of the Honorable William Healy, Presiding Judge [Clk. T. 27].

U. S. C., section 111, to-wit: Assaulting a federal officer.[3]

Following appellant's plea of not guilty, the cause was tried by a jury and lasted for two and one-half days. On August 30, 1956, the jury returned a guilty verdict against appellant (and the co-defendant).[4]

Appellant filed a motion for judgment of acquittal (and in the alternative, for a new trial) on September 6, 1956 [Clk. T. 3-5]. Said motion was argued before the trial court on September 18, 1956 [R. 258-263], and denied the same day [Clk. T. 6].

On September 24, 1956, the trial judge pronounced judgment and sentenced appellant to serve one year in the penitentiary [Clk. T. 12].[5]

Notice of Appeal from said Judgment, Orders and Sentence was filed September 27, 1956 [Clk. T. 14-15], and a specification of the points to be relied upon was submitted pursuant to Rule 17(6) of the Rules of this Court [Clk. T. 22].

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[3]§111. *Assaulting, resisting, or impeding certain officers or employees.*

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[4]Clk. T. 2.

[5]The probation officer recommended denial of probation on the sole ground that the offense herein involved a federal officer [Clk. T. 11].

Because of delays in the preparation of the Reporter's Transcript, a motion to enlarge time within which to docket the Appeal was filed and granted by the trial court on November 7, 1956.

Appellant remains out on bond pending disposition of this appeal [Clk. T. 19].

Statement of the Case.

On Sunday, May 20, 1956, William Sherrill, an investigator for the Immigration-Naturalization Service [R. 16],[6] entered the La Chaquita Cafe in East Los Angeles, California, for the purpose of making an arrest [R. 39]. Armed with a gun and badge, but no warrant,[7] Sherrill went directly to the rear of the Cafe, and methodically questioned each patron at the bar as to his place of origin [R. 21, 42]. The circumstances which purportedly precipitated this investigation were these:

About six days earlier, Sherrill received a tip from an unnamed informant that three "illegals"[8] were frequenting the Cafe on week ends [R. 17; see also Gov. Ex. 1]. Sherrill reported this intelligence to his superiors, who, in turn, assigned him to investigate the matter the following week end, if and when any of them should reappear [R. 17-19].

Sunday evening, about six o'clock, Sherrill received the informer at his home, one block from the Cafe [R. 32, 79], and was told that one of the three "illegals" was

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[6]R. refers to the Reporter's Transcript of the oral proceedings had in the trial court and contained in the transcript of record, pages 1-274.

[7]See R. 39-40.

[8]The term "illegals" refers to aliens unlawfully in the United States.

there, wearing a white shirt, a mustache, and describing him as tall and heavily built [R. 20] ". . . as unusually large for a man of Mexican descent" [R. 34].

When the informer left, Sherrill changed into street clothes [R. 37], and drove to Montebello (California) to make arrangements for the overnight housing of his potential prisoners [R. 19-20]. With some difficulty, he located a police station [R. 20, 38], but was advised by the officer on duty that the station had no feeding facilities for federal prisoners [R. 20]. Sherrill then made a telephone call to the East Los Angeles Sheriff's Office, with whom he was able at last to make such arrangements [R. 20].

Sherrill then returned home to pick up his gun and handcuffs and drove off to the Cafe [R. 21, 80].

Appellant was seated at the bar conversing with a friend when Sherrill entered [R. 161]. But their conversation was interrupted when Sherrill attempted to interrogate appellant [R. 161]. The evidence is conflicting as to whether or not Sherrill identified himself to appellant at that time [R. 23, 163]; but it is not controverted that appellant shoved the officer aside in the belief he was drunk and resumed his conversation [R. 161]. Moments later, appellant heard a scuffle, to his rear, turned, and saw Sherrill, gun in hand, struggling with two men [R. 162].

Apparently, Sherrill had observed a hulky, white-shirted man, with a mustache, "edging toward the front door" [R. 23], and ran over to intercept him [R. 23]. Identifying himself to that person, Sherrill demanded to know his place of birth [R. 24]. The man answered in English, "What difference does it make?" [R. 24]. While Sherrill was thus engaged with the suspect, someone

grabbed him from the rear, and the struggle ensued [R. 24].

When appellant observed Sherrill holding a gun on the two men, he entered the fray for the limited purpose of disarming him [R. 163]. But appellant was unsuccessful and was quickly subdued [R. 164]. Sherrill then placed him under arrest, locked a handcuff on one of appellant's wrists, and led him back to the bar [R. 74, 164].

A moment later, Sherrill was again seized from behind, overcome and disarmed, and his revolver was hidden [R. 75-77]. That ended the altercation [R. 76].

Thereafter, Sherrill removed the handcuffs from appellant's wrist, and left the Cafe to call for help [R. 27]. During his absence most of the customers left; but appellant remained [R. 78].[9] Sherrill returned a few minutes later, followed by Sheriff's deputies, and the appellant was taken into custody [R. 28].

Issues Presented.

That appellant interfered with Sherrill is not disputed. Moreover, Sherrill's testimony that he identified himself to appellant prior thereto [R. 23], if believed, is probably sufficient evidence of scienter as a matter of law, although it may be noted that such testimony was self-serving and uncorroborated.

Only two issues, therefore, confront this Court. The first is whether Sherrill was engaged in the performance

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[9]Sherrill testified on cross-examination as follows [R. 45]:

"Q. And while you were gone, they could have escaped; is that true? A. They could have, yes.

Q. At the time you went to call the sheriffs you didn't know the names of the defendants, did you? A. No, I did not."

of an official duty within the meaning of the penal statute at bar when he entered the La Chaquita Cafe to make an arrest without a warrant, and when he interrogated patrons of the Cafe without warrant.

This question was raised during trial when appellant made a motion for judgment of acquittal upon the close of the government's evidence [R. 153-157], at the close of all the evidence [R. 238], and after the jury verdict of guilty, upon a motion for judgment of acquittal, or in the alternative, for a new trial [Clk. T. 3-5; R. 258-263]. All of these motions were denied by the trial court [R. 157, 238; Clk. T. 6].

The second question which this court is asked to consider is whether or not the trial judge committed reversible error in excluding evidence as the nature and identity of Sherrill's informer [R. 35-36]. This point was also raised on appellant's motion for judgment of acquittal [Clk. T. 4], and discussed in his memorandum of points and authorities in support thereof (not included in the record at bar).[10]

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[10]It may be further observed that the probation report [Clk. T. 8-11] reflects an exemplary background of steady employment, good military service record, no prior criminal record and a fine family. Yet, it recommends denial of probation because of the offense involved. At the hearing for sentence, counsel for appellant urged that the recommendation was not only unfair upon the facts at bar, but that the probation statute (18 U. S. C. A., sec. 3651) does not distinguish the offense herein alleged from any other not involving the death penalty or life imprisonment [R. 265-268]. When viewed upon the record at bar, the sentence of appellant to a year in prison seems harsh and unjust, if not error for failure to exercise discretion.

Specification of Errors Relied Upon.

1. Error in the trial court's denial of appellant's motion for judgment of acquittal at the close of government's evidence, at the close of all the evidence and after jury verdict, in that the plaintiff has failed to carry its burden of proving that Sherrill was engaged in the performance of an official duty at the time the alleged offense was committed.

2. Error in the trial court's denial of appellant's motion for judgment of acquittal in that the jury's verdict convicting appellant was not supported by substantial evidence that Sherrill was performing an official duty at the time of the alleged offense.

3. Error of the trial court in denying appellant's motion for judgment of acquittal in that jury verdict convicting appellant was contrary to the weight of the evidence indicating that Sherrill was not engaged in the performance of an official duty at the time of the alleged offense.

4. Error of the trial court in excluding evidence as to the identity of Sherrill's informer, and denying appellant the right to inquire into that subject.

The prosecution objected to such inquiry on the ground that public policy favors protection of informants against possible harm resulting from their disclosure [R. 35].

Appellant argued that the question went to the issue of whether or not Sherrill was performing his official duties at the time of the alleged offense—*i.e.*, whether Sherrill was justified in relying solely upon an informer's word in entering the La Chaquita Cafe [R. 36].[11]

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[11]See also footnote 9, *supra*.

ARGUMENT.

I.

Sherrill, the Immigration Officer, Was Not Engaged in the Performance of His Official Duties at the Time the Alleged Offense Was Committed.

A.

Preliminary Statement.

Appellant was charged with, and convicted of, violating Title 8, U. S. C. A., section 111, in that he forcibly assaulted and interfered with William Sherrill, an immigration officer, who, as appellant is purported to have known, was engaged in the performance of his official duties [Clk. T. 1].

Appellant contends that as a matter of law, Sherrill was not performing his office lawfully at the time of the alleged offense, and that, therefore, any interference therewith did not offend section 111 (*United States v. Di Re,* 332 U. S. 581, 594; *Alexander, The Law of Arrest* (1949), Vol. I, p. 498; *cf. Johnson v. United States,* 333 U. S. 10, 16).[12]

It is axiomatic that any society has the right and duty to guard itself from those who plunder it, or disregard its laws. Accordingly, such Society may appoint agents to keep the public peace and enforce its statutes, and vest in them authority to apprehend persons reasonably thought guilty of breaching same. In consideration for effective security from lawlessness, the individual may be required to surrender a measure of his liberty and dignity. But such Society—at least ours—then owes a duty to protect

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[12]Whether appellant may have violated some other federal or state statute, or is liable to the officer in tort, is, of course, not before the Court.

its constituents from the overzealous guardianship of its watchmen. A safeguard is thus to be found in the Fourth Amendment to the Federal Constitution which declares:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It got there because history taught "that the police acting on their own cannot be trusted" (*McDonald v. United States,* 335 U. S. 451, 456). Those lessons have been noted with sufficient frequency that they need no repetition here. (*Boyd v. United States,* 116 U. S. 616, 627-630; *Sgro v. United States,* 287 U. S. 206, 210; *cf. McDonald v. United States, supra,* p. 556; *United States v. Di Re, supra,* p. 595).

It is enough to reaffirm that ours is a government of laws, not of men; and that the lawless enforcement of the law puts the government in the role of law breaker. That result is avoided by balancing the interests of the State against the human rights of the citizen. Under such a standard, peace officers are protected against wrongful interference with their duties only so long as the methods which they employ do not tend to destroy the very foundations of the system they are assigned to safeguard.

B.

Sherrill Manifestly Exceeded His Authority in Entering the La Chaquita Cafe to Make an Arrest Without a Warrant, and Hence Was Not Performing an Official Duty within the Meaning of 18 U. S. C. A., Section 111.

At common law, a private citizen had the power to arrest without warrant for a felony actually committed if he had reasonable cause to believe the arrestee committed it (*United States v. Coplon* (C. C. A. 2), 185 F. 2d 629, 634). The peace officer had those powers, and additionally, the right to arrest for felony, though none had been committed, if he had reasonable grounds for believing the person arrested committed it (*United States v. Coplon, supra*).

With some modification, these rules have been codified in California, and are probably indigenous to most other States. (Calif. Pen. Code, secs. 836, 837; 4 Am. Jur., sec. 25, p. 18).

However, in the case at bar, immigration officers draw their powers of arrest directly from a federal statute (8 U. S. C. A., sec. 1357(a)), and not from the California or common law of arrest (see: *United States v. Di Re, supra,* p. 589).

Section 1357(a)(2) empowers immigration officers to make arrests without warrant *only* if he has reason to believe the arrestee is an alien unlawfully in the country, *and* that there is a likelihood that such person will escape before a warrant can be obtained (see Appendix). The latter condition obviously narrows the arresting powers of immigration agents beyond that which they would have possessed at common law.[13] Presumably, Congress was

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[13]Compare the Second Circuit's view of a similar statute in *Coplon v. United States,* 185 F. 2d 629, 634-636, cert. den., 342 U. S. 920.

mindful of the inconvenience and humiliation to innocent persons detained without *just cause,* and chose to deposit in *other* than the arresting officer, *except in emergencies,* the determination of whether there is probable cause for an arrest (compare: *McDonald v. United States,* 335 U. S. 451, 455-456; *United States v. Lefkowitz,* 285 U. S. 452, 464; *United States v. Coplon, supra,* pp. 634-635; see: Attorney General's regulations, 17 F. R., p. 11513, sec. 242.12).[14]

It is crystal clear from Sherrill's own testimony that his entry into the La Chaquita Cafe to make an arrest without a warrant was not predicated upon a reasonable belief that (1) an alien was there who was illegally in the country, and (2) that such person was likely to escape before a warrant for his arrest could be obtained.

1.

SHERRILL ACTED SOLELY UPON THE WORD OF AN INFORMER WHICH, WITHOUT MORE, DID NOT JUSTIFY AN ARREST WITHOUT A WARRANT.

Sherrill admitted entering the Cafe for the express purpose of making an arrest of an alleged "illegal" [R. 39]. Yet, the *only* basis for his belief that an "illegal" was in the Cafe, and was subject to arrest, was upon the unverified, unsworn statement of an unnamed informer [R. 37]. There is absolutely no testimony or evidence in the record at bar that the informer was, or had proved reliable; and the only clue as to why Sherrill did not first seek a warrant was his voluntary assertion that—

> "Under the Act of Congress, I may arrest without Warrant" [R. 39].

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[14]Under 17 F. R. 242.1, authority for issuing warrants of arrest is left in certain designated officers, all of whom would be Sherrill's superiors. See Appendix.

The fact is, however, that the evaluation of the reliability and sufficiency of information forming the basis for the arrest of any person is a matter which both the Congress and the Attorney General entrusted exclusively to Sherrill's superiors (see: 17 F. R., secs 242.1, 242.12 and 242.13, Appendix; see also: 17 F. R., pp. 11512-11514, secs. 242.11(c) and (d)).

Besides, the bare word of an informer—particularly one not shown to have proved trustworthy—does not equip a peace officer with *just cause* for making an arrest with or without a warrant (*Nathanson v. United States,* 290 U. S. 41, 47; *Grau v. United States,* 287 U. S. 124; see also: *Brinegar v. United States,* 338 U. S. 160, 175-176; *Johnson v. United States,* 333 U. S. 10, 16-17; *Carroll v. United States,* 267 U. S. 132, 161-162). This is not to say that an informer's report cannot furnish a basis for an arrest where the officer has acquired personal knowledge of facts tending to corroborate it. But here there was none! There is no independent evidence indicating that the La Chaquita Cafe was a regular hang-out for "illegals"; or, that the designated "illegal" was previously under the surveillance of the Immigration Service; or that the "illegal" was about to flee—indeed, there is not even any evidence as to the grounds the informer had for allegedly asserting the presence of aliens in the Cafe who had no right to be there.

Thus, Sherrill's entry into the La Chaquita for the purpose of making an arrest hangs upon the slender reed of suspicion. Fortunately, mere suspicion will not sustain the issuance of a warrant of arrest (*Nathanson v. United States,* 290 U. S. 41, 47; *cf.* 17 F. R., secs. 242.12 and 242.13). How then can it be expected to support an arrest without one? Of course, it cannot be-

cause both 8 U. S. C. A., section 1357(a), and the Fourth Amendment forbid such "rash and unreasonable interferences with [an individual's] privacy, and from unfounded charges of crime" (*Brinegar v. United States, supra,* p. 176).

2.

SHERRILL HAD NO REASONABLE CAUSE FOR BELIEVING—AND IN FACT HAD NO BELIEF—THAT THE "ILLEGAL" WAS LIKELY TO ESCAPE BEFORE A WARRANT COULD BE OBTAINED.

Furthermore, there was ample time for Sherrill to procure a warrant before making the arrest, as he well knew; and therefore, his entry into the La Chaquita Cafe without one was unjustified.

Actually, the information which Sherrill received that Sunday afternoon came as no surprise—if it came at all. He and his *superiors* had been expecting it for almost a week [R. 13, 17].

Moreover, Sherrill's conduct following his receipt of the informer's message destroys any inference that escape of the "illegal" was anticipated imminently. For although Sherrill lived only *one* block from the Cafe [R. 32, 79], it took him no less than ONE HOUR to get there [R. 21, 33, 81].

First he slipped into a shirt and trousers, and possibly put on a tie [R. 37]; then, notwithstanding the presence of a phone near his living quarters [R. 86], he *drove* to Montebello in order to—

> ". . . find a place to book the man in case I had him, because I didn't feel like driving into Los Angeles" [R. 79].

But when informed at the Montebello Police Station that there were no available facilities for feeding federal prisoners, he *telephoned* the East Los Angeles Sheriff's office, and made such arrangements there [R. 80].

Sherrill thereafter *returned home* for his gun and handcuffs which he had left behind because:

> "I didn't care to put on a holster and all the equipment necessary to carry a gun . . ." [R. 85].

But a moment later he complains—

> ". . . If you have carried a revolver in your side pants pocket, it is not exactly comfortable or handy" [R. 85].

In short, Sherrill was in no hurry; and by the time he reached the Cafe, sufficient time had elapsed during which a warrant could have been procured, assuming the issuance of one was proper in light of the evidence he had.

Nevertheless, Sherrill entered the Cafe without a warrant, and, ignoring the "illegal" who was purportedly the cause of his visit, and who apparently was still there [R. 23], he proceeded toward the rear of the establishment, and began interrogating persons who concededly did not fit the description of the man he was seeking [R. 42, 71].

These are patently not the acts of an immigration agent inspired by a reasonable belief that escape of an "illegal" was likely if a warrant was first sought. Sherrill does not even excuse his failure to first procure a warrant upon the usual (though improper) grounds of inconvenience, but rather upon what he construes to be his perogative [R. 39]. As reflected by the record at bar, Sherrill's actions are those of an officer who prefers not to subject his purpose or powers to the distinterested consideration of one authorized to do so. That is the kind of over-

zealous enforcement of the law which the judiciary has so emphatically condemned (see: *Johnson v. United States, supra; United States v. Di Re,* 332 U. S. 581; *McDonald v. United States,* 335 U. S. 451).

In sum, Sherrill's entry into the La Chaquita Cafe for the purpose of making an arrest was so far beyond the scope of his office that section 111 cannot reach it (*Coplon v. United States* (C. C. A. 2), 185 F. 2d 629, 635-636, cert. den., 342 U. S. 920). The *Coplon* case is particularly analogous to the one at bar, because the statutory powers of arrest granted the F.B.I. agents there involved contained virtually the same limitations as those given Sherrill under 8 U. S. C. A., section 1357(a). Thus, in *Coplon,* Congress had provided F.B.I. agents with power to arrest without warrant—

> ". . . where the person making the arrest has reasonable grounds to believe that . . . there is a likelihood of his escaping before a warrant can be obtained for his arrest" (18 U. S. C. A., sec. 3052 (1948)) (see Appendix).

The F.B.I. agents had Coplon under surveillance for several months, during which time they observed her surreptitious comings and goings, and furtive meetings with a Russian. The agents finally arrested her, but without a warrant, and seized some government documents found in her possession. The prosecution was permitted at trial, to introduce the documents thus obtained into evidence. and the defendant was ultimately convicted. On appeal, Judge Learned Hand, writing for a unanimous Court, set aside the conviction upon two grounds, one of which was that the arrest of Miss Coplon had been illegal because made without a warrant, and therefore, the evidence found upon her could not support the conviction. What is sig-

nificant to the case at bar, however, is that Coplon's arrest was held unlawful because the F.B.I. agents had no power under the aforementioned statute to make it without a warrant except in an emergency. And Judge Hand determined as a matter of law that the facts of the case presented no such emergency.

The post-*Coplon* legislative history also deserves a brief comment because it tends to serve as a gloss on how Congress intended the "likelihood of escape" clause in section 1357(a) to be construed. Three weeks after the *Coplon* decision was published, Congress amended 18 U. S. C. A., section 3052, by deleting the emergency clause (see: 18 U. S. C. A., sec. 3052, as amended, January 10, 1951, chap. 1221, sec. 1, 64 Stat. 1239, Appendix herein). Yet, the "likelihood of escape" clause was retained in section 1357(a)(2) of the Immigration and Nationality Act of 1952.

It may be contended that the *Coplon* case is not governing here because no arrest was actually made;[15] but this fact in no way cures the defect in Sherrill's status. For one thing, Sherrill flatly stated that he went to the Cafe to make an arrest [R. 39]. He had made elaborate pre-arrangements for the disposition of his quarry [R. 79-80]. And, it is with this purpose and intent that the government seeks to put Sherrill on the footing of an officer engaged in the performance of an official duty. It follows that since Sherrill's objective was, under the circumstances, illegal, that characteristic colors his entire mission while in the Cafe (*cf. Johnson v. United States,* 333 U. S. 10).

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[15]A point conceded *arguendo* only since it would appear that an arrest was made when the officer detained the man he was looking for [see: R. 71].

3.

SHERRILL'S ARBITRARY INTERROGATION OF PATRONS IN THE LA CHAQUITA CAFE IS FURTHER EVIDENCE THAT HE WAS NOT ENGAGED IN THE PERFORMANCE OF AN OFFICIAL DUTY AT THE TIME OF THE ALLEGED DEFENSE.

Moreover, Sherrill's improper purpose and intent upon entering the La Chaquita Cafe was supplemented by other excesses of authority during his visit.

Thus, Sherrill testified [at R. 42] that upon entering the Cafe—

> "A. I came to the rear seat and on the right-hand side of each person I would crowd in between him and the person on his right, show him my credentials in front of him, stating, 'I am an immigration officer and I would like to know your place of birth, please.'
>
> Q. And you proceeded down toward the front? A. Toward the front of the bar, yes.
>
> Q. And you asked everbody seated there that same information? A. That same information.
>
> Q. And of course you ultimately came to Mr. Amaya and asked him the same question for identification; is that correct? A. Yes, that is correct.
>
> Q. Was Mr. Amaya wearing a mustache at that time? A. I don't know whether he was or not.
>
> Q. Wouldn't have made any difference at all? A. It wouldn't have made any difference."

8 U. S. C. A. 1357(1) provides Immigration Officers with power to interrogate without warrant:

> ". . . any alien or person believed to be an alien as to his right to be or to remain in the United States."

Nevertheless, it is clear from Sherrill's testimony, that he had no belief at all—let alone a reasonable one—that the persons he interrogated were aliens, and/or were unlawfully in the United States. For Sherrill, "it wouldn't have made any difference" [R. 42]; it was "just normal procedure" to interrogate persons at random as to their right to be there [R. 71].

The Fourth Amendment to the Constitution gives every individual in this country the right to be let alone—and particularly the right not to be molested or annoyed arbitrarily and unnecessarily by the police (see: *Carroll v. United States,* 267 U. S. 132, 153-154; *cf. Brinegar v. United States,* 338 U. S. 160, 176; *McDonald v. United States,* 335 U. S. 451, 455). This is one of the basic human rights which distinguishes our system from the police state (*Johnson v. United States,* 333 U. S. 10, 17). Consequently, interference with such arbitrary and capricious police activity as here practiced cannot be deemed violative of section 111.

II.

It Was Prejudicial Error for the Trial Court to Preclude Appellant's Counsel From Inquiring Into the Identity of Sherrill's Alleged Informer.

The sole basis for Sherrill's purported belief that there was an "illegal" in the La Chaquita Cafe was intelligence to that effect said to have been related to him by an informer [R. 19]. Having chosen to act upon that information, he thereby thrust into issue the reasonableness of his decision. It was, therefore, appropriate for appellant to put that decision to the test of cross-examination by inquiring into the nature and identity of its source. (*Wilson v. United States* (C. C. A. 3), 59 F. 2d 390, 392; *United States v. Blich* (D. C. D. Wyo.), 45 F. 2d 627, 629; compare *Coplon v. United States, supra,* at p. 638).

But the prosecution objected to such inquiry, not for immateriality, but—

> ". . . on the grounds that the courts have consistently held that the names of informants are not to be disclosed, for their own protection, for quite obvious reasons. In this case, it is even more obvious that the name of the informant should not be disclosed" [R. 35].

The validity of this objection is questionable inasmuch as the accused were not the subjects of the informer's accusations. Nevertheless, the government's objection was sustained by the trial court.

It is respectfully submitted that the ruling of the learned trial judge sustaining the government's objection was error which deprived appellant of due process of law and of his right to have compulsory process for obtaining witnesses in his favor (Fifth and Sixth Amendments to the Federal Constitution).

The government had the burden of proving that Sherrill was performing an official duty at the time of the alleged offense and performing it properly. The prosecution could not do so—at least under the circumstances posed by the record at bar—without showing that the officer acted upon probable cause in entering the La Chaquita Cafe. The fact of probable cause was in turn wholly dependent upon the existence and reliability of the informer, and the substantiality and nature of what he had to say. Since those facts were apparently enough to motivate Sherrill to interrogate and arrest innocent persons without a warrant on a claim of reasonable cause, it was for the trier of fact to determine the justification for that claim. A Court or jury could not do so, of course, unless it was able to pass upon the same "facts"

which had confronted Sherrill. His belief need not have been that of the trier of fact, in which case, the appellant's acquittal would be assured (*United States v. Blich, supra; cf. Wilson v. United States, supra*).

Undoubtedly, there are certain cases wherein the prosecution may conceal the identity of informers, and cannot be required to divulge it. But here the government seeks to conceal the very facts with which it colors Sherrill's authority. To permit so unfair an advantage over an accused would be unconscionable (*Coplon v. United States, supra,* at p. 638).

> "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled" (*Wilson v. United States* (C. C. A. 3), 59 F. 2d 390, 392).

In the *Wilson* case, a government witness testified that entry into the private hall of an organization had been effected by means of a key furnished by one of the members. When asked to identify him, the witness refused, and was adjudged in contempt of court. That judgment was sustained on appeal for the reasons just quoted.

That result, however, was unnecessarily harsh, and is not advocated here. Rather, the government should be put to a choice: Either expose the evidence upon which it relies, so that the appellant may have an opportunity to meet it, or suppress the information, and abandon the prosecution (*Coplon v. United States, supra,* p. 638, where the issue was framed around State secrets; *cf. Andolschek v. United States* (C. C. A. 2), 142 F. 2d 503, 506; *Delaney v. United States* (C. C. A. 1), 199 F. 2d 107; *Christoffel v. United States* (C. C. A. D. C.), 200

F. 2d 734. See also: *United States v. Watkins* (D. C. S. D. N. Y.), 67 Fed. Supp. 554, 556, aff'd, 158 F. 2d 853).

Such a doctrine may be a compromise, but its logic is sound for it leaves to the government the choice of pursuing that course of action which it regards as most affected by the public interest—prosecution or suppression—without penalizing the accused by the removal of evidence vital to his defense (*Coplon v. United States, supra,* p. 638). Indeed, it is a compromise which could be adopted only in a country which deeply values human life and liberty.

That choice was available to the government here; it chose prosecution. Hence, the ruling of the trial judge denied appellant his constitutional rights.

Conclusion.

The judgment of conviction should be vacated, and the cause remanded with directions to enter judgment of acquittal, or in the alternative, to grant appellant a new trial.

Respectfully submitted,

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APPENDIX.

Other Statutes Involved or Compared.

I.

8 U. S. C. A., sec. 1357(a):

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States; . . ."

II.

18 U. S. C., sec. 3052 (1948):

"The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony

and there is a likelihood of his escaping before a warrant can be obtained for his arrest.

III.

18 U. S. C., sec. 3052 (as amended January 10, 1951):

"The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

IV.

Regulations of Immigration and Naturalization Service involved (references to 17 F. R., pp. 11512-11513):

Sec. 242.1. WARRANT OF ARREST. (a) *Issuance.* Subject to the limitations in this part, district directors, district enforcement officers, district officers, and the assistant district officers who are in charge of investigations, and officers in charge of sub-offices may issue warrants of arrest.

Sec. 242.12. APPLICATIONS FOR WARRANTS OF ARREST. If, after preliminary investigation, the investigating officer determines that a prima facie case for deportation of an alien exists, he shall apply for a warrant of arrest to an officer having authority to issue warrants of arrest.

Sec. 242.13. ISSUANCE OF WARRANTS OF ARREST. Any officer mentioned in sec. 242.1 (a), who receives an application for a warrant of arrest may issue such warrant in any case in which he determines that a prima facie case for deportation has been established.